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In The

Supreme Court of the United States

SOUTH FLORIDA WATER MANAGEMENT DISTRICT,

Petitioner,

v.

MICCOSUKEE TRIBE OF INDIANS, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF *AMICUS CURIAE* THE CITY OF WESTON, FLORIDA, IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the transfer of untreated water from one natural source to another requires a National Pollutant Discharge Elimination System (NPDES) permit under the federal Clean Water Act, 33 U.S.C. § 1342.

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INTEREST OF *AMICUS CURIAE*

Amicus curiae, the City of Weston (hereinafter referred to as the "City") submits this brief in support of petitioner South Florida Water Management District (hereinafter referred to as the "District") seeking reversal of the lower court's decision in *Miccosukee Tribe of Indians, Sam Poole v. South Florida Water Management District; Friends of the Everglades v. South Florida Water Management District*, 280 F.3d 1364 (11th Cir. 2002).[1]

The City has a compelling interest in seeing that the question presented in this case is answered in the negative, and the Eleventh Circuit Court of Appeals' decision reversed. That interest is as a permit holder discharging to the District's water management system and as a taxpayer, along with all City property owners, with ultimate responsibility to fund the District's activities. The NPDES program is the wrong program to address water quality issues associated with the transfer of water.

The City offers its own experience, as an example of the multiple ways in which municipal stormwater is already heavily regulated. Efforts to protect and improve water quality within the City pursuant to these programs include:

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[1] Pursuant to Rule 37.4, the law firm of counsel for the City serves as the authorized law officer of the City, so no motion is required. Pursuant to Rule 37.6, *amicus* City represents that counsel for the City authored this brief in its entirety and that no person or entity other than the City and its representatives made any monetary contribution to the preparation or submission of this brief.

(a) the creation of one of the largest and most successful wetland mitigation projects in the country by the City with no federal or state funding, and its continued management and maintenance by the City;

(b) the City's voluntary participation in a District program to institute Best Management Practices in the management of City property and monitor water quality indicators; and

(c) the District's plans to develop, by the end of 2006, a massive Stormwater Treatment Area in the City through which all water in the C-11 Canal will be diverted prior to reaching the S-9 pump station.

Together, these activities are projected to reduce the phosphorus load in the City's stormwater runoff by at least 85%. Requiring the District to meet the requirements of the NPDES program now, prior to the full implementation and benefit of these activities, would require wasteful and duplicative investments in short term treatment solutions.

The City is located in the C-11 West Basin, Broward County, Florida, bordering the western edge of the developed area protected from catastrophic flooding by the District's levee system. The majority of the City's stormwater runoff ultimately flows into the C-11 Canal. The S-9 pump station, which is the object of respondents' attack, controls the water levels in the C-11 Canal and, when necessary, transfers water from the canal into Water Conservation Area 3A. *Miccosukee*, 280 F.3d at 1366. As noted by the Eleventh Circuit, "Without the operation of the S-9 pump station, the populated western portion of Broward County would flood within days." *Id.* at 1366. Respondents do not dispute this fact. *Id.* at 1369-71. Thus,

the City has a compelling interest in the outcome of this case, and urges this Court to agree with the Eleventh Circuit that such an injunction can never be an appropriate remedy.

SUMMARY OF ARGUMENT

South Florida's regional water management system existed for decades before the enactment of the Clean Water Act in 1972. The United States Environmental Protection Agency (EPA) has never required that such transfers and diversions operate pursuant to Clean Water Act NPDES permits. To do so now, as sought by respondents, would upset decades of settled expectations and place at risk billions of dollars in public and private investment. The City and its more than sixty thousand residents are directly at risk should the District ever be forced to discontinue operation of the S-9 pump station.

The City is not insensitive to environmental issues, and is proud of its status as home of one of the largest and most successful locally funded wetland mitigation projects in the country. It and other agencies have taken many steps to control the amount and improve the quality of the stormwater runoff discharged into the District's water management system and through the S-9 pump station. These programs are projected to reduce the amount of phosphorus, a key indicator for the Everglades, by over 85% in the next three to five years. The City agrees with the District (and other *amici* supporting the District) that numerous provisions of federal, state and local law are more appropriate mechanisms than the NPDES program

to address potential sources of pollution or naturally occurring conditions in municipal stormwater.

FACTUAL BACKGROUND

The City is located in the C-11 West Basin, Broward County, Florida, bordering the western edge of the developed area protected from catastrophic flooding by the District's levee system. The City is home to over 60,000 residents, and the taxable value of its property was nearly $5 billion in 2002. See City of Weston *2002 Performance Report*, www.westonfl.org/notices_events/annualreport/weston 2002ar.pdf,p.2 and www.westonfl.org at "Demographics." The City was incorporated in 1996, but the property comprising the City was developed beginning in the late 1970s and had been in agricultural use prior to that time. Development began following approval of a 1978 "Development of Regional Impact" by Broward County. The first residents arrived in 1984. See www.westonfl.org at "History."

Prior to its development, the City, along with the vast majority of Southeast Florida, was part of the historical Everglades. *Miccosukee*, 280 F.3d at 1366 and 1369, n.8. Water naturally flowed to the south, towards Florida Bay, and intermingled east to west. The majority of the City's stormwater runoff is collected through a system of lakes and canals. This stormwater runoff flows south, pursuant to a state permit subjecting the City to water quality requirements, into the C-11 Canal operated by the District.

The S-9 pump station, which is the object of respondents' attack, controls the water levels in the C-11 Canal

and, when necessary, transfers water from the canal into Water Conservation Area 3A. *Miccosukee*, 280 F.3d at 1366. As noted by the Eleventh Circuit, "Without the operation of the S-9 pump station, the populated western portion of Broward County would flood within days." *Id.* at 1366. Respondents do not dispute this fact. *Id.* at 1369-71.

Transfers and diversions of untreated water are essential to the design and operation of Florida's regional flood control system. The development of the City of Weston relied on the existence of this system of flood control. The City was master planned and the development process was heavily regulated by county, state and federal law. See generally Ted R. Brown, *Regulating Wetlands: The Florida Approach*, SG096 ALI-ABA 99 (2002). All aspects of the City's development were in accordance with all applicable environmental laws, and the City has never been found in violation of any of its permits.

ARGUMENT

I.

ENJOINING THE SOUTH FLORIDA WATER MANAGEMENT DISTRICT FROM OPERATING THE S-9 PUMP STATION WOULD NOT BE IN THE PUBLIC INTEREST BECAUSE OF THE RESULTING HAZARDS TO THE CITY AND ITS SIXTY THOUSAND RESIDENTS.

Without the S-9 pump station in operation, and the ability to discharge into the C-11 Canal, the City would routinely be subjected to massive flooding that would endanger lives and public and private property.

A recent example is Hurricane Irene, in October 1999. Although it was only a weak Category 1 hurricane, the City received nearly twenty inches of rain in two days according to the City's Public Works staff. See also Doug Rekenthaler Jr., et al., *Irene Drenches Florida, Brings More Rain to Flood-Weary North Carolina*, DisasterRelief.org (October 26, 1999), www.disasterrelief.org/Disasters/991018irene5/.

The flooding not only immobilized the City and damaged property; it also had a human toll. Eleven-year-old twins and their fourteen-year-old friend were shocked to death in the City, when they stepped into a puddle energized by a power line. Their mother also was killed when she stepped into the puddle in an attempt to rescue them. *Id.* Other safety and environmental hazards posed by flooding include the back-up of raw sewage into the streets, resulting from the flooding of sanitary sewer lift stations, as has occurred within the City after storms in the past. Such spills are not only immediately hazardous to human health; they also contaminate the stormwater runoff being discharged to the District's system and thus pose a danger to water quality. This is just one example of how flood control systems can be essential to the maintenance of environmental quality, as well as human life and property.

The District and City staffs routinely operate their pump stations before projected storms to lower water levels in the lakes and canals and increase the available storage capacity. See generally Martin Merzer, *Blustery storm could cause floods: Canals lowered in preparation for rain as system strengthens*, The Miami Herald (August 14, 2003), www.miami.com/mld/miamiherald/news/weather/6526708.htm. Even though staff prepared for Irene by pumping down the levels of the City's lakes and canals,

and even though the S-9 pump station was in continuous operation, the City experienced extensive flooding of roads. In some cases, water was only a foot or so away from entering homes, according to Public Works staff. It took two weeks after the storm for water levels in the system to return to normal, with all City pumps running and the S-9 pump station also running.

Without the S-9 pump in operation and without the ability to discharge to the C-11 Canal, the damage in the City would have been much more severe and long-lasting. Even if one assumes that floodwaters do not enter houses or other structures, all but the most major roadways in the City would be impassable, according to the analysis of City engineering staff. Most property would not be accessible other than by boat or helicopter, including the City's hospital, and police, fire and public works facilities. Even under ideal conditions, with a storm following a dry period, all canals being recently cleaned out, and the system at its maximum capacity, City staff estimate that it could take seven to ten days for flooding to recede under these conditions. If the storm were to follow a rainy period, there is no way to know how much longer it might take. In addition to paralyzing the City and preventing residents from accessing needed services, such sustained inundation will lead to major damage to the City's system of surface roads by undermining the integrity of the road beds and damaging asphalt surfaces. Even milder flooding, that does not render the road impassable, could damage the road base.

The excess water would be extremely damaging to the natural environment as well. The City's 1,800 acres of wetland mitigation areas are designed and managed to maintain precise water levels at approximately 4 feet

above sea level. Small mammals might be stranded or drowned, and various flora and fauna might be damaged or killed by sustained high water levels.

Petitioner asks the Court to reverse a decision by the Eleventh Circuit Court of Appeals that threatens the operation of South Florida's regional water management and flood control system. Massive amounts of public and private monies were invested in reliance on this system, and on the various permits authorizing the development of the City. Without this system, private and public property in the City will be defenseless against the ravages of flooding from storms. The City urges this Court to agree with the Eleventh Circuit that the public interest requires that the District must never be enjoined from operation of the S-9 pump station.

II.

A NPDES PERMIT IS NOT NECESSARY, BECAUSE OTHER FEDERAL, STATE, REGIONAL AND COUNTY REQUIREMENTS ADEQUATELY PROTECT WATER QUALITY IN THE C-11 WEST BASIN, AS SHOWN BY THE CITY'S EXAMPLE.

Weston was developed with environmental oversight from various federal, state and county regulatory agencies, and satisfied all applicable requirements. In 1976, the District issued Permit No. 06-00060-S to Arvida Corporation, the master developer of the majority of the City. The permit allowed the construction of a system of culverts, lakes and canals ultimately connecting to the C-11 Canal. The first water quality program was instituted at that time, to control the effects of the existing cattle grazing operations on the quality of stormwater runoff. Monitoring

of water quality also began at this time, and continues to the present.

In order to obtain District approvals for the residential development that was later to become the majority of the City, the developer was required to demonstrate that there would be no adverse water quality or quantity impacts to the C-11 Canal, and the Water Conservation Area 3-A into which the S-9 pump drained. District staff concluded that there would be no adverse impact on water quality from development of the project as proposed. The surface water management plan received conceptual District approval in 1978 via Permit No. 06-90002-S.

Modifications to these permits were issued later by the District, as necessitated by the continued development of the area that became the City. Each of these modifications was evaluated to ensure that no adverse water quality or quantity impacts would result. The permit required the developer, and now the City, to maintain a more extensive Water Quality Monitoring Program, which is being conducted to this day. The Program demonstrates that phosphorus levels in the City's water management system have never consistently increased, from 1976 to date, despite the nearly complete buildout of the City over that timeframe.

The system is designed to hold water before releasing it to the C-11 Canal, so that pollutants can settle out and the water is cleaner when it reaches the District's system. As part of the requirements for development of the City, all properties were required to have their own stormwater management systems that retain the first inch of runoff onsite, to allow for treatment via settling of the most polluted "first flush" of runoff following a storm.

As mitigation for the impact of its development on the environment, the developers of the City created a signature $15 million, massive wetland mitigation area. See City of Weston *2002 Performance Report*, *supra* at 9. See also areas zoned "CV" and designated "Conservation Area" (all are wetland mitigation area)on the City's Zoning Map and Existing Land Use Plan at www.westonfl.org/commission_departments/zoning.html and www.westonfl.org/commission_departments/existing.html. This mitigation was entirely funded through local and private dollars, with no federal or state funding. The project performs wetland functions including flood control, water quality enhancement, water supply preservation, wildlife habitat preservation, energy transfer and nutrient cycling.

Agencies involved in reviewing or permitting the project included the Environmental Protection Agency, the U.S. Corps of Engineers, Florida Department of Environmental Protection, the Florida Department of Community Affairs, the Florida Game and Freshwater Fish Commission, Broward County, and a variety of environmental interest groups. The mitigation area is protected through conservation easements, and contains continuing requirements for maintenance. A Wetland Quality Index Monitoring Report is used to measure whether the project is considered successful; to date, three of the five areas in the project have achieved success.

Another example of projects within the City that improve water quality is the District's planned 1,700-acre, four-foot deep Stormwater Treatment Area, through which all C-11 canal water will be routed for storage and treatment prior to reaching the S-9 pump station, which is under construction within the City. See Neil Santaniello, *Water board to spend $33 million saving Weston land from*

development, Sun-Sentinel (September 13, 2002) at www.sun-sentinel.com/news/local/broward/sfl-cpwater13sep13.story. See also areas zoned "AE" and designated "Vacant" (most are slated to become stormwater treatment area) on the City's Zoning Map and Existing Land Use Plan at www.westonfl.org/commission_departments/zoning.html and www.westonfl.org/commission_departments/existing.html. This area will reduce seepage, provide groundwater recharge, and function as part of the District's Comprehensive Everglades Restoration Plan, the $8 billion project being implemented by the District and various other parties. See www.evergladesplan.org and www.evergladesplan.org/pm/projects/proj_41.cfm. Construction is scheduled to be complete, and the vast majority of environmental benefit received, by the end of 2006. See Burns & McDonnell, *Final Report, Everglades Protection Area Tributary Basins, Conceptual Plan for Achieving Long-Term Water Quality Goals* (March 17, 2003) at www.sfwmd.gov/org/erd/bsfboard/waterquality.pdf, Table ES.2, p. ES-9.

A third example is that the City (through its Indian Trace Development District, which operates the relevant water management system) has entered into a voluntary interlocal agreement with the District for a Local Water Quality Monitoring Program for the C-11 West basin. See May 20, 2002 Agenda and Minutes, Item 8.J., at www.westonfl.org/commission_minutesinfo/minutes/MinutesMay202002.pdf. See also South Florida Water Management District, *Everglades Stormwater Program, Program Summary, Urban Tributary Basins Program Elements* (November 1999) pp. 15-18 at www.sfwmd.gov/org/reg/esp/pdfs/espsum/utb.pdf and *Summary of C-11 West Basin Program*, at www.sfwmd.gov/org/reg/esp/c11w.html. This Agreement involves instituting Best Management Practices for public land

management, training private landscaping companies and managers in these practices, monitoring water quality measurements, and identifying strategies to address "hot spots," if any, found within the City.

These steps will continue to reduce the phosphorus load in the City's stormwater runoff discharges to the C-11 Canal, and thereby assist the District in meeting state water quality standards under the Everglades Forever Act of 1994, Section 373.4592, Fla. Stat. (2003). However, for a variety of scientific and financial reasons, the improvements in water quality resulting from these efforts will not be realized overnight. There is no guarantee, for example, that they would allow the District to satisfy the water quality standards of the NPDES program within the next year if this Court upholds the Eleventh Circuit decision in *Miccosukee*. If they do not, the District would ultimately be faced with the short-term obligation to treat untreated water (in other words, building a costly water treatment plant to improve the water quality in the C-11 Canal, which might only be needed from the present to the end of 2006) or to curtail or cease operation of the S-9 pump station.

The District's analysis of the alternatives concluded that other options are costly, few, and inefficient, in light of the overall health of the Everglades. The Basin Specific Feasibility Study for Achieving Long-Term Water Quality Goals for the C-11 Basin recently concluded that the Basin delivers a relatively small amount of the total phosphorus load to the Everglades, and the cost of chemical treatment to meet state water quality standards immediately would be, in large part, wasted. The implementation of existing efforts by the end of 2006 as planned, with no changes, will lead to an 85% reduction in the phosphorus load at

the S-9 pump station. See Burns & McDonnell, *supra* at Map of Basin, p. ES-3 and pp. ES-4 and 3-21 through 3-24.

The cost of this duplicative requirement for the District to comply with NPDES criteria would affect the City in two ways. First, as a District permit holder flowing into the C-11 Canal, the City will inevitably be subjected to additional costly conditions designed to further assist the District in meeting its NPDES permit obligations. Second, the City and its taxpayers will be directly subjected to these unnecessary costs, because all owners of property located in the District pay substantial sums in ad valorem taxation each year towards the support of all the District's activities.[2]

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[2] Moreover, the principle of requiring an NPDES permit for movement of untreated water from one place to another raises the question of whether the City itself would be required to obtain NPDES permits for the various facilities in its stormwater management system, in addition to satisfying the District's standards and permitting requirements at the discharge into the C-11 Canal. If so, where would the line be drawn? When the water passes through a culvert from a subdivision lake into a City canal, will that culvert need a NPDES permit? If not, will it be required where two canals intersect and their waters mingle? It is hard to see what principle would limit the City's liability for a NPDES permit to its discharge point into the C-11 Canal. Like the District, the City is merely a transporter of municipal stormwater and should not be subjected to a permitting program designed to regulate those who release pollutants into navigable waters.

CONCLUSION

For the foregoing reasons, the City respectfully requests that that the decision of the Court of Appeals for the Eleventh Circuit to require a NPDES permit for the S-9 pump station, which has serious potential negative consequences for the continued viability of the City, be reversed.

Respectfully submitted,

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